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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 606.

UNITED STATES OF AMERICA,
Appellant,

vs.

WILLIAM H. SPRAGUE and WILLIAM J. HOWEY,
Defendants-Appellees.

BRIEF FILED IN SUPPORT OF THE JUDGMENT BY ELIOT TUCKERMAN (AS *AMICUS CURIAE*).

ELIOT TUCKERMAN
(As *Amicus Curiae*).

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The rehearing of the question of the interpretation of Article V of the Constitution of the United States, raised by the appellees in this suit, presents an issue of such paramount importance to all the people of this country that the undersigned has asked and received leave to file this brief, as *amicus curiae*, in the public interest.

The immediate question presented by the appeal is whether the Eighteenth Amendment to the Constitution, so-called, was ratified in accordance with the provisions of the Constitution, as amended. The appellant's contention is that, if the Eighteenth Amendment was so ratified the indictment should not have been quashed.

This brief is submitted in support of the judgment appealed from on the theory that, whether its ratification was or was not in accordance with the provisions of the Constitution, as originally adopted or as amended, the Congress acted without power in proposing the so-called Eighteenth Amendment, which is, for that reason, void.

Congress did not have power to propose the Eighteenth Amendment upon the affirmative vote of 282 members of the House of Representatives, and 47 Senators.

The Question Is Justiciable.

The Legislature of the State of New York, on convening on January 2, 1918, received a communication from the Governor of the State transmitting a Joint Resolution of Congress proposing an amendment to the Constitution of the United States (now known as the Eighteenth Amendment) purporting to have passed "two-thirds of each house concurring therein". *N. Y. Assembly Journal, 114th Session, 1918, Vol. 1, p. 18.*

Formal objection to the proposed amendment was made in the Assembly on March 6, 1918, because the requirement of Article V of the Constitution of the United States, that two-thirds of both Houses, of the Congress shall deem the same necessary, was not complied with. *N. Y. Assembly Journal, 1918, Vol. 1, p. 575.*

The Speaker thereupon ruled that the question of the construction of that article of the Constitution of the United States would probably have to be passed upon by the Supreme Court.

The Legislature of the State of New York, on March 7, 1918, passed the following Joint Resolution of the Senate and Assembly:

"Whereas, Article V of the Constitution of the United States provides that the Congress whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to the Constitution; and

Whereas, the Governor of the State of New York on January 2, 1918, transmitted to the Legislature a copy of a Joint Resolution of the Congress proposing an Amendment to the Constitution of the United States; and,

Whereas, a question has been raised in this Assembly as to whether the foregoing provision of Article V of the Constitution of the United States was complied with, and whether the above-mentioned Joint Resolution is lawfully before the Legislature of this State; therefore be it

Resolved (if the Senate concur), that the Clerk of this Assembly be directed to request the Clerk of the United States Senate and the Clerk of the House of Representatives to transmit to him for the information of the Legislature of this State duly certified copies of the Roll Calls of the Senate and of the House of Representatives respectively, upon the passage of said Joint Resolution, and that upon receipt thereof he forthwith inform this Assembly thereof."

N. Y. Assembly Journal, 1918, Vol. 1, pp. 634-5, 641.

The Secretary of the United States Senate and the Clerk of the House of Representatives, complying with this request, transmitted to the New York Assembly duly certified documents setting forth the votes and roll calls on which the Joint Resolution was declared passed, as follows:

UNITED STATES SENATE—OFFICE OF THE SECRETARY

JAMES M. BAKER,
Secretary.

I, James M. Baker, Secretary of the Senate of the United States of America, do hereby certify that the hereto attached sheets, numbered 1 and 2 are true and correct copies of extracts from the Journal of the Senate of the United States of America relating to the passage of Senate Joint Resolution 17, 65th Congress, proposing an amendment to the Constitution of the United States.

In testimony whereof I hereunto subscribe my name and affix the seal of the Senate of the United States of America, this ninth day of March, A. D., 1918.

JAMES M. BAKER,
Secretary of the Senate of the United States.

EXTRACT FROM THE JOURNAL OF THE UNITED STATES SENATE.

(The following extract from the Journal of the United States Senate for the Legislative Day of July 31, 1917, Calendar Day of August 1, 1917, relates to the passage of the Joint Resolution (S. J. Res. 17) proposing an amendment to the Constitution of the United States and commonly known as the National Prohibition Amendment.)

No further amendment being proposed.

Ordered, that the resolution be engrossed and read a third time.

The said resolution was read the third time.

On the question, Shall the resolution pass?

It was determined in the affirmative (Yeas, 65; Nays, 20).

Those who voted in the affirmative were: Messrs. Ashurst, Bankhead, Beckham, Borah, Brady, Chamberlain,

Colt, Cummins, Curtis, Fernald, Fletcher, Frelinghuysen, Gore, Gronna, Hale, Harding, Hollis, Johnson of California, Jones of New Mexico, Jones of Washington, Kellogg, Kendrick, Kenyon, King, Kirby, Knox, LaFollette, McCumber, McKellar, McNary, Martin, Myers, Nelson, Newlands, Norris, Overman, Owen, Page, Pittman, Poindexter, Ransdell, Robinson, Saulsbury, Shaforoth, Sheppard, Sherman, Shields, Simmons, Smith of Arizona, Smith of Georgia, Smith of Michigan, Smith of South Carolina, Smoot, Sterling, Stone, Sutherland, Swanson, Thompson, Trammell, Vardaman, Walsh, Watson, Williams and Wolcott.

Those who voted in the negative were: Messrs. Brandegee, Broussard, Calder, Culberson, France, Gerry, Hardwick, Hitchcock, Husting, James, Lewis, Lodge, Penrose, Phelan, Pomerene, Reed, Underwood, Wadsworth, Warren and Weeks.

So it was,

Resolved, That the resolution pass, two-thirds of the Senators present having voted therefor.

Ordered, That the Secretary request the concurrence of the House of Representatives therein.

(The Senate concurrence to the House amendments to the Joint Resolution.)

Tuesday, December 18, 1917.

National Prohibition Amendment.

The Vice President laid before the Senate the amendments yesterday received from the House of Representatives for concurrence to the joint resolution (S. J. Res. 17) proposing an amendment to the Constitution of the United States.

Mr. Gallinger raised a question as to the presence of a quorum:

Whereupon,

The Vice-President directed the roll to be called; when sixty-nine senators answer to their names, a quorum being present,

On motion of Mr. Sheppard, that the Senate agree to the amendments of the House of Representatives,

On a division of the Senate the yeas were 47 and the nays were 8.

So it was,

Resolved, That the Senate agree thereto, two-thirds of the Senators present having voted therefor.

Ordered, That the Secretary notify the House of Representatives thereof.

[COPY.]

SOUTH TRIMBLE,
Clerk.

HOUSE OF REPRESENTATIVES,
CLERK'S OFFICE,
WASHINGTON, D. C.

I, South Trimble, Clerk of the House of Representatives, of the United States of America, hereby certify that the following is an extract from the original journal of the House of Representatives, of the proceedings, had and done on the seventeenth day of December, nineteen hundred and seventeen; to-wit:

"The question being, upon the consideration of Senate Joint Resolution, No. Seventeen, submitting an amendment to the Constitution.

"The question being on agreeing to the joint resolution as amended and being taken, the yeas and nays being demanded and ordered by one-fifth of the members present,

"Those who voted in the affirmative are—

Adamson Alexander Almon Anderson Anthony Ashbrook Aswell Austin Ayres Baer Blankhead Barkley Barnhart Beakes Bell Beshlin Black Bland Booher Borland Bowers Brand Brodbeck Browning Broumbaugh Burnett Burroughs Butler Byrnes S. C. Bryns, Tenn. Campbell, Kans. Chandler Miss Cannon Caraway Carlin Carter Mass.

Carter, Okla. Clark Fla. Claypool Collier Connally, Tex. Connelly, Kans. Cooper, Ohio Cooper, W Va Cooper Wis Copley Costello Cox Cramton Crisp Currie, Mich. Dale, Vt. Dallinger Darrow Decker Dempsey Denison Denton Dickinson, Dill Dillon Dixon Doolittle Doughton Dowell Drane Dunn Elliott Ellsworth Elston Emerson Esch Evans Fairfield Farr Ferris Fess Fields Fisher Flood Focht Fordney Foss Foster Frear French Fuller Ill Fuller, Mass. Gandy, Garrett, Tenn Garrett, Tex Glass Goodwin N. C. Good Goodall Gould Graham, Ill Green, Iowa Gregg Griest Hadley Hamilton, Mich Hamilton, N. Y. Hamlin Harrison, Miss Harrison, Va Hastings Haugen Hawley Hayden Helm Helvering Hensley Hersey Hicks Hilliard Holland, Hollingsworth Hood Houston Howard Hull, Tenn Humphreys Hutchinson Ireland Jacoway James Johnson, Ky Johnson S Dak. Johnson, Wash. Jones Tex. Jones, Va. Kearns Keating Kehoe Kelley, Mich, Kelly, Pa. Kennedy, Iowa Kettner Kiess, Pa. Kincheloe King Kincaid Kitchin Knutson Kraus Kreider LaFollette Langley Larsen Lee Ga. Lenroot Lever Little Littlepage Lobeck Lundeen Lunn McClintic McCormick McCulloch McFadden McKenzie McKeown McKinley McLaughlin, Mich Mapes Mays Miller, Minn. Mondell Montague Moon Moores, Ind. Morgan Mott Nelson Nicholls, S. C. Norton Oldfield Oliver, Ala Olney Osborne Overstreet Padgett Paige Park Parker, N. Y. Peters Platt Polk Powers Pratt Price Purnell Quin Ragsdale Rainey Raker Ramseyer Randall Rankin Rayburn Reavis Reed Robbins Robinson Romjue Rose Rowe Rowland Ruley Rucker Russell Sanders, Ind. Sanders, La. Saunders N. Y. Saunders, Va Schall Scott, Iowa Scott, Mich Sears Sells Shackleford Shallenberger Shouse Sims Sinnott Sisson Slemp Sloan Smith, Idaho Smith, Mich. Snell Snook Steagall Stedman Steenerson Stephens, Miss Sterling, Ill. Sterling Pa. Stevenson Stiness Strong Sumners Sweet Switzer Taylor, Ark Temple Thomas Thompson Tillman Timberlake Towner Treadway Venable Vestal Vinson Volstead Walker Walton Wason Watkins Watson, Va Weaver Webb Welling Whaley Wheeler White, Me.

White, Ohio Williams Wilson, Ill Wilson, La. Wingo wise Wood, Ind. Woods, Iowa Woodyard Young, N. Dak. Young, Tex Zihlman.

Those who voted in the negative are—

Bacharach Blackmon Britten Bruckner Buchanan Caldwell Campbell, Pa Cantrill Carew Cary Chandler, N. Y. Church Clark, Pa Classon Coady Crago Crosser Dale, N. Y. Davidson Davis Dent Dewalt Dies Dominick Dooling Doremus Drukker Dupre Dyer Eagan Edmonds Estopinal Fairchild, B. L. Fitzgerald Flynn Francis Freeman Gallagher Gard Garland Garner Gillett Glynn Gordon Graham Pa. Gray, Ala Gray, N. J. Greene, Mass. Greene, Vt Griffin Hamill Hardy Haskell Heaton Heflin Huddleston Hulbert Hull, Iowa Igoe Juul Kahn Kennedy, R I Key, Ohio Lazaro Lea, Cal. Lehlbach Lesher Linthicum London Lonergan Longworth Lufkin McAndrews McArthur McLaoughlin, Pa McLemore Madden Magee Mann Mansfield Martin Mecker Merritt Moore, Pa Morin Mudd Nichols, Mich Nolan Oliver, N. Y. O'Shaunessy, Overmyer Parker, N. J. Phelan Porter Pou Ramsey Riordan Roberts Rodenberg Rouse Sabath Sanford Scott, Pa Shirley Sherwood Siegel Slayden Small Smith, C B Smith T. F Snyder Stafford Steele Sullivan Swift Talbott Templeton Tilson Van Dyke Vare Voigt Waldow Walsh Ward Watson, Pa Welty Wilson, Tex Winslow.

Whereupon, the Speaker announced that the yeas are 282 and the nays are 128, and two thirds having voted in the affirmative the joint resolution was agreed to.

A motion by Mr. Webb to reconsider the vote by which the joint resolution was agreed to was, on his motion, laid on the table. Ordered that the clerk request the concurrence of the Senate in the joint resolution as amended.

In testimony whereof, I have this day as Clerk of the House of Representatives, set my hand, and affixed the Great Seal of the House of Representatives, of the United States of America, on this the Ninth day of March, in the year of our Lord, nineteen hundred and eighteen.

SOUTH TRIMBLE,
Clerk of the House of Representatives.

These documents are printed in full in the New York Assembly Journal, 1918, Vol. 1, pp. 700-704.

It thus appears as a public record that the Joint Resolution proposing the Eighteenth Amendment originated in the United States Senate where it was passed by a vote of 65 to 20. It was amended in the House of Representatives, and, as amended, was declared agreed to by a vote of 282 to 128. The Senate thereafter, 69 Senators being present, agreed to the amendments by a vote of 47 to 8.

The full membership of the United States Senate is 96. The full membership of the House of Representatives is 435.

It cannot be urged in relation to this Amendment that the certificate of the presiding officers of the Senate and House of Representatives, that the Joint Resolution was passed two thirds of each House concurring therein, is conclusive in this Court.

The question of the constitutionality of the vote by which the amendment was proposed was left to this Court on the record by the Legislature of New York State. The question is therefore justiciable.

The Rule of *Stare Decisis* Does Not Preclude Its Reconsideration.

The Joint Resolution was presumably declared carried in accordance with the legislative precedent which has grown up in the Congress to the effect that each house is constituted as a "House" within the meaning of the Constitution when a quorum of the membership is present; and that "two thirds of both Houses", as mentioned in the Constitution signifies two thirds of those voting on the measure in each house, a quorum being present.

Hinds Precedents of the House of Representatives, Vol. 5, pp. 1009-10, 7027.

This construction has been approved by this Court.

> *Missouri Pacific Ry. Co.* v. *Kansas*, 248 U. S.;
> *National Prohibition Cases*, 253 U. S.

The question, however, being the construction of the Constitution of the United States, this Court has recognized that although the doctrine of *stare decisis* is a salutary one, and is to be adhered to on proper occasions in respect of decisions directly upon points in issue, the Court should not extend any decision upon a constitutional question if it is convinced that error in principle might supervene.

> *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429

In his first Inaugural Address, President Lincoln expressed this view in these words:

> "I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding, in any case, upon the parties to a suit, as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled, and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time the candid citizen must confess that if the policy of the government upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation be-

tween parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal."

The contention herein advanced is that this precedent and these decisions of this Court are at variance with the express words and the intention of the Constitution, and therefore do not represent the Law of the Land as defined in paragraph 2 of Article VI of the Constitution.

This contention is chiefly based upon a letter written on January 5, 1804, by Gouverneur Morris to Uriah Tracy, then a member of the United States Senate from Connecticut, which was not considered when this question was before this Court.

This letter is printed in volume three at page 198 of the Life of Gouverneur Morris, written by Jared Sparks, published in 1832 from which the following extract is taken:

"The idea, that two thirds of the whole number of Senators and of the whole number of Representatives are required by the Constitution to propose an amendment, is certainly correct. There are, I believe, only six cases in which the majority of a quorum cannot act. In one of these cases, viz. the choice of a President by the House of Representatives, a majority of all the States is required, and the reason is evident.

"In two other cases, which respect only the Senate, two thirds of the members present are required. One of them is the case of treaties. To have bound the whole union by the act of a mere majority of Senators present would, in effect, have given the power of making treaties to the President, since, by watching opportunities, he could always have secured such majority. And to have demanded a majority of

the whole number might have occasioned delay, dangerous in many cases, and especially when a treaty of peace should be under consideration. By a provision of that sort, absentees would have given an efficient negative without direct responsibility. Of course, cunning men, some of whom will always be found in legislative bodies, would frequently have lain by to approve or disapprove, according to subsequent circumstances, which, in affairs so urgent as the ratification of national compacts, might have proved fatal.

"In the case of impeachment the same reasoning applies. If a mere majority could convict, public officers might be made the victims of party rage. If a majority of the whole number were required, members might, by absenting themselves, screen the guilty without incurring direct reproach. In the one case, faction would have too much, and in the other, justice would have too little power.

"There remain three cases in which two thirds of the whole number are required. These are, first, the expulsion of a member; secondly, the passage of a law disapproved of by the President; and, thirdly, amendments to the Constitution. In these three cases a provision is carefully made to defend the people against themselves, or, in other words, against that violence of party spirit, which has hitherto proved fatal to republican government. The constitutional restriction presumes, that, to a measure of indispensable necessity, or even of great utility, two thirds of the whole number of Senators and Representatives would agree, and that, if they should not, no great danger would ensue. The public business might go on, though a member of the legislature should be unworthy of his seat. Neither would the union materially suffer from the want of a particular law, especially of a law rejected by the first magistrate.

"The case of war may indeed be supposed, and the additional case of corrupt opposition by the President to the organization of public force; but even, if it were allowable to reason from extreme cases, which, as every one knows, would be fatal to all legal and constitutional provisions, yet, in this extremest case, the corrupt President could, with less danger of detection, do more evil by a misapplication of the public force, than by opposing its existence.

"So in the case of amendments to the Constitution, it was presumed, that America might enjoy a tolerable share of felicity under the existing compact, and that, if a case should arise to point out the necessity of amendment, two thirds of the whole number of each legislative body would concur in the recommendation."

The Federal Constitutional Convention of 1787 delegated to a Committee of five of its members the duty of drafting the Constitution as agreed upon in the Convention. This Committee consisted of William Samuel Johnson, Alexander Hamilton, Gouverneur Morris, James Madison and Rufus King, and Gouverneur Morris was the actual draftsman of the Constitution, as appears by the following extracts taken from two letters, printed in the Life of Gouverneur Morris, above mentioned, at page 284 of volume one and page 322 of volume three, respectively:

James Madison to Jared Sparks: April 8, 1831.

"The *finish* given to the style and arrangement of the Constitution fairly belongs to the pen of Mr. Morris; the task having, probably, been handed over to him by the chairman of the Committee, himself a highly respectable member, and with the ready concurrence of the others. A better choice could not have been made, as the performance of the task proved. It is true, that the state of the materials,

consisting of a reported draft in detail, and subsequent resolutions accurately penned, and falling easily into their proper places, was a good preparation for the symmetry and phraseology of the instrument, but there was sufficient room for the talents and taste stamped by the author on the face of it. The alterations made by the Committee are not recollected. They were not such, as to impair the merit of the composition. Those, verbal and others, made in the Convention, may be gathered from the Journal, and will be found also to leave that merit altogether unimpaired."

Gouverneur Morris to Timothy Pickering, Dec. 22, 1814:

"But, my dear Sir, what can a history of the Constitution avail towards interpreting its provisions. This must be done by comparing the plain import of the words, with the general tenor and object of the instrument. That instrument was written by the fingers, which write this letter. Having rejected redundant and equivocal terms, I believed it to be as clear as our language would permit; excepting, nevertheless, a part of what relates to the judiciary. On that subject, conflicting opinions had been maintained with so much professional astuteness, that it became necessary to select phrases, which expressing my own notions would not alarm others, nor shock their self love, and to the best of my recollection, this was the only part which passed without cavil.

"But, after all, what does it signify, that men should have a written Constitution, containing unequivocal provisions and limitations? The legislative lion will not be entangled in the meshes of a logical net. The legislature will always make the power, which it wishes to exercise, unless it be so organized, as to contain within itself the sufficient check. Attempts to restrain it from outrage, by

> other means, will only render it more outrageous. The idea of binding legislators by oaths is puerile. Having sworn to exercise the powers granted, according to their true intent and meaning, they will, when they feel a desire to go farther, avoid the shame if not the guilt of perjury, by swearing the true intent and meaning to be, according to their comprehension, that which suits their purpose."

A study of the opinion of the Court in *Missouri Pacific Railway Company* v. *Kansas*, reveals that the Supreme Court placed strong reliance on a statement of fact, appearing in a foot note to George Ticknor Curtis's History of the Constitution. The inaccuracy of that statement is attested by the letter of Morris to Tracy, quoted above, and by the "Letters of a Landowner" written by Oliver Ellsworth, and hereinafter mentioned, neither of which letters were brought to the attention of the Court in either of the cases herein mentioned.

Amendment as Contrasted With Revolution.

The Constitution sought to provide a method by which the Government may be changed peacefully by Amendment, rather than forcibly by Revolution.

Curtis's History of the Constitution says of this subject, at Volume 2, pages 473-477 (italics mine):

> "The next topic on which the Convention was required to act was the question whether the Constitution should be made capable of amendment, and in what mode amendments were to be proposed and adopted. The Confederation, from its nature as a league between States otherwise independent of each other, was made incapable of alteration excepting by the unanimous consent of the States. It affords

a striking illustration of the different character of the government established by the Constitution, that a mode was devised by which changes in the organic law could become obligatory upon all the States, by the action of a less number than the whole.

"The frame of government which the members of the Convention were endeavoring to establish, if once adopted, was to endure, as a continuing power, indefinitely; and that it might, as far as possible, be placed beyond the danger of destruction, it was necessary to make it subject to such peaceful changes as experience might render proper, and which, by being made capable of introduction by the organic law itself, would preserve the identity of the government. The existence and operation of a prescribed method of changing particular features of a government mark the line between amendment and revolution, and render a resort to the latter, for the purpose of melioration or reform, save in extreme cases of oppression, unnecessary. According to our American theory of government, revolution and amendment both rest upon the doctrine, that the people are the source of all political power, and each of them is the exercise of an ultimate right. But this right is exercised, in the process of amendment, in a prescribed form, which preserves the continuity of the existing government, and changes only such of its fundamental rules as require revision without the destruction of any public or private rights that may have become vested under the former rule. Revolution, on the contrary, proceeds without form, is the violent disruption of the obligations resting on the authority of the former government, and terminates its existence often, without saving any of the rights which may have grown up under it. *The question, therefore, whether the Constitution should be made capable of amendment, was identical with the question whether some mode of amending it should be prescribed in*

the instrument itself, since, without an ascertained and limited method of proceeding, all change becomes, in effect, revolution; and this was accordingly, in substance, the same as the question whether revolution should be the only method by which the American people could ever modify their system of government, when in the progress of time changes might become indispensable.

"It was originally proposed in the Convention, that provision should be made for amending the Constitution, without requiring the assent of the national legislature.[1] But this was justly regarded as a very important question, and the Convention came to no other decision, when the committee of detail were instructed, than to declare that provision ought to be made for amending the Constitution whenever it should seem necessary.[2] The mode selected by the committee, and embraced in the first draft of the instrument, was to have a convention called by the Congress, when applied for by the legislatures of two thirds of the States; but they did not declare whether the legislatures were to propose amendments and the convention was to adopt them, or whether the convention was both to propose and adopt them, or only to propose them for adoption by some other body or bodies not specified. There lay, therefore, at the basis of this whole subject, the very grave question whether there should ever be another national convention, to act in any manner upon or in reference to the national Constitution, after its adoption, and if so, what its functions and authority were to be. There would follow, also, the further question, whether this should be the sole method in which the Constitution should be made capable of amendment. Several reasons concurred to render it highly in-

[1] Elliot, V 157.
[2] Elliot, V. 376.

expedient to make a resort to a convention the sole method of reaching amendments, and we can now see that the decision that was made on this subject was a wise one. It was a rare combination of circumstances that gave to the first national Convention its success. The war of the Revolution, and the exigencies which it caused, had produced a class of men, possessing an influence, as well as qualifications for the duty assigned to them, that would not be likely to be again witnessed. Of these men, Washington was the head; and no second Washington could be looked for. The peculiar crisis, too, occasioned by the total failure of the Confederation, notwithstanding the apparent fitness and actual necessity of that government at the time of its formation, could never occur again. There were, moreover, but thirteen States in the confederacy, nearly all of which dated their settlement and their existence as political communities from about the same period, and all had passed through the same revolutionary history. But the number of States was evidently destined to be greatly increased, and the new members of the Union would also be likely to be very different in character from the old States. It was not probable, therefore, that the time would ever arrive when the people of the United States would feel that another national convention, for the purpose of acting on the national Constitution, would be safe or practicable. Still, it would not have been proper to have excluded the possibility of a resort to this method of amendment; since the national legislature might itself be interested to perpetuate abuses springing from defects in the Constitution, and to incur the hazards attending a convention might become a far less evil than the continuance of such abuses, or the failure to make the necessary reforms.

"But it was indispensable that the precise functions and authority of such a convention should be

defined, lest its action might result in revolution. The method of amendment proposed by the committee of detail did not enable the Congress to call a convention on their own motion, and did not prescribe the action of such a body, or provide any mode in which the amendments proposed by it should be adopted. Hamilton and Madison both opposed this plan;—the former, because it was inadequate, and because he considered it desirable that a much easier method should be devised for remedying the defects that would become apparent in the new system; the latter, on account of the vagueness of the plan itself. Accordingly, Mr. Madison brought forward, as a substitute, a method of proceeding, which, with some modifications, became what is now the fifth article of the Constitution; namely, that the Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments; or, on the application of the legislatures of two thirds of the States, shall call a convention for proposing amendments. In either case, the amendments proposed are to become valid as part of the Constitution, when ratified by the legislatures of three fourths of the States, or by conventions in three fourths of the States, as the one or the other mode of ratification may be proposed by the Congress.'[1]

The Decision in the Prohibition Cases Should Be Reversed.

The Supreme Court decided the meaning of the words "two thirds of both houses," governing proposals of Amendments to the Constitution, for the first time in the National Prohibition Cases, 253 U. S.

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[1] Elliott, V. 530-532.

In those cases the Court had the assistance of oral argument as well as briefs, but the question then presented, to which this brief is directed, had previously been covered by the Court in *dicta* in another case known as *Missouri Pacific Railway Company v. Kansas*, 248 U. S. That case had been submitted without argument and in that case the Court was only supplied with four short and inadequate briefs to guide its determination. The Court adopted its own dicta in the Kansas case, as its *ratio decidendi* of the National Prohibition Cases on this point.

The letter written by Gouverneur Morris to Uriah Tracy, dated January 5th, 1804, was not referred to in any of the briefs submitted to the Supreme Court in any of the cases referred to, and practically nothing relied on in this brief was then before the Court.

The writer hopes that we may return to the meaning of the Fifth Article of the Constitution with which that letter shows it was written, and was proposed to and ratified by the People, and which its terms indicate, if not affected by construction and interpretation from extraneous sources.

This will necessitate a reconsideration and modification by the Supreme Court of its decision on this point in the National Prohibition Cases.

In the light of the letter of Gouverneur Morris, the draftsman of the Constitution, which has heretofore been overlooked by everybody, nothing seems to stand in the way of a modification by the Court of its decision, except the fear that some of the other amendments might be affected.

This fear is believed to be utterly groundless.

It is understood that those Amendments were passed in the manner approved at the time by the Legislative Precedents, were not formally questioned at the time of their proposal to the States, or of their ratification by the States, and they were all adopted many years ago. Moreover, the Court would undoubtedly decline to go back of the certificates of the proper officials who have, presumably, certified, in every case, that the resolutions proposing the amendments were passed, two thirds of both Houses concurring. No citizen may question them; and it is safe to surmise that no State would be heard to do so, at this late date.

The Fourteenth Amendment stands in a different position. It has been consistently opposed in the State of New York from the beginning, on the ground that it did not receive the required number of votes in Congress, and the roll calls of those votes, duly certified, were obtained by the Legislature and are in the archives of the Assembly.

N. Y. Assembly Journal; 1918; Vol. I, pp. 575-6, 634-5, 700-704.

History of the Amendments.

The Supreme Court in *Missouri Pacific Railway Company* v. *Kansas*, did not have the advantage of oral argument, as has been stated, and the four short briefs submitted made the most casual mention of the history of the Amendments, if they can be said to have touched this important subject at all.

The Court in its decision of that case gives considerable weight to the supposed precedents of the First Session of the First Congress.

The First Ten Amendments.

It is impossible, in the short compass of this brief to present a picture of that First Session. It was supposed to convene in New York City on the fourth of March, 1789. Eleven States by that time had ratified the Constitution, several of them with petitions, and one upon the condition, that Amendments would promptly be adopted incorporating in the Constitution a "Bill of Rights" as the Anglo Saxon race had come to know certain historical provisions defending the "inalienable rights of man". On the day set only eight Senators appeared, and it was not until those eight had twice sent forth appeals to the others, that, on April 6th, Richard Henry Lee, of Virginia, arrived, making the twelfth Senator, necessary for a quorum, and the Senate convened, and counted the ballots which showed that Washington had received the unanimous vote of the Presidential Electors for President.

Washington's First Inaugural Address to Congress.

On April 30th, Washington took the oath as President, on a gallery of the Federal Hall, on Wall Street, and afterwards delivered his first inaugural address to Congress in the Senate Chamber, in which he stated:

> "*Besides the ordinary* objects submitted to your care, it will remain with your judgment to decide, how far an exercise of *the occasional power delegated by the fifth article of the constitution* is rendered expedient at the present juncture by the nature of objections which have been urged against the system, or by the degree of inquietude which has given birth to them.—Instead of undertaking particular recommendations on this subject, in which I

could be guided by no light derived from official opportunities, I shall again give way to my entire confidence in your discernment and pursuit of the public good:—for I assure myself that whilst you carefully avoid every alteration which might endanger the benefits of an united and effective government, or which ought to await the future lessons of experience; a reverence for the characteristic rights of freemen, and a regard for the public harmony, will sufficiently influence your deliberations on the question how far the former can be more impregnably fortified, or the latter be safely and advantageously promoted."

(Italics mine.) Senate Journal, First Ed. 1789, p. 25.

It will be noted that Washington did not include the proposal of Amendments to the Constitution in the *ordinary business* of Congress, as the Supreme Court seems to have done. He spoke of such an act as "*an exercise of the occasional power delegated by the Fifth Article of the Constitution*".

That is indeed high authority, which, so far as the writer is able to state, has not heretofore been cited to the Supreme Court *on this point*.

The Outlook of the Country in 1789.

In order to understand the action of the Congress in proposing the first ten amendments, it is necessary to appreciate the state of affairs which then confronted the country. Those were the days which John Fiske has aptly described as the "Critical Period of American History".

"Looking backward and thinking of the long life that the Constitution has enjoyed, and remembering how imme-

diate and great were the successes attending the organization of the new government and Hamilton's financial measures, one can hardly imagine the chaotic condition of affairs that confronted Washington when he took the oath of office in the spring of 1789. The strongest men of the country were behind him: Hamilton, Madison, Robert Morris, James Wilson, and those who had worked with them in the Federal Convention; John Jay, Thomas Jefferson, and John Adams, who had no part in the actual framing of the document; even Patrick Henry, George Clinton, and Samuel Adams, who had opposed its adoption,—all these men and many others in the second rank were anxious to see the new system given a full and fair trial. They cannot be said to have formed a political party, for they were held together by no organic bond, except that of patriotic desire for their country's welfare."

Channing, History of the U. S., Vol. 4, pp. 35-6.

"One thing that postponed attempts to divide the Union into two or three portions was the adoption of the first eleven amendments. In their eagerness for ratification, Washington and Madison had practically pledged themselves to labor for the passage of amendments that would make the Constitution more palatable." *Ib.*, p. 157.

The only real opposition that existed to the proposals, which ultimately became the first ten amendments, was on the ground that a Bill of Rights had no place in the Constitution. No one denied the propositions stated in the amendments, but they were considered by many to be self evident.

James Wilson, speaking in the Pennsylvania Convention, called to ratify the Constitution, had said that he did not

remember hearing of a motion to include a Bill of Rights in the Constitution during the debates in the Convention.

See Elliot's Debates, Vol. 2, p. 435.

Yet all realized that many of the people wished that amendments might be adopted, restraining the new National Government, and assuring them of their "inalienable rights".

The necessity for amendments, to allay public anxiety, is clear from the debates in the House, reported in the Annals of its First Session. (First printed in 1834.)

Washington, never a partisan, had alluded to this need in his Inaugural, and had spoken, with characteristic moderation, of the "nature of objections which have been urged against the system, or by the degree of inquietude which has given birth to them." *supra.*

James Madison, later a Jeffersonian Republican, in support of the Amendments which he had introduced in the House, had said, in answer to those who thought them unnecessary:

> "But I do wish to see a door opened to consider so far as to incorporate those provisions for the security of rights, against which I believe no serious objection has been made by any class of our constituents: such as would be likely to meet with the concurrence of two-thirds of both Houses, and the approbation of three-fourths of the State Legislatures."

Annals (Edition of 1834), p. 433, and see p. 424.

Elbridge Gerry, later a Jeffersonian Republican, expressed the anxiety all felt as follows:

> "Whatever might have been my sentiments of the ratification of the constitution without amendments, my sense now is, that the salvation of America de-

> pends upon the establishment of this Government, whether amended or not. If the constitution which is now ratified should not be supported, I despair of ever having a Government of these United States."
>
> Annals, p. 445.

Thus, though many of the statesmen then in Congress thought the "Bill of Rights" was secure without Amendment under the original Constitution, they "deemed it necessary" to propose the Amendments within the meaning of the Fifth Article of that instrument, as the whole course of their proceedings shows.

THE JOURNALS OF THE FIRST SESSION OF CONGRESS.

There are kept, in the vault of the Association of the Bar of the City of New York, copies of the Journals of the Senate and of the House of Representatives of the First Session of the First Congress, the former printed in 1789, the latter printed by Francis Childs and John Swaine, undated, but apparently contemporaneous.

The writer has spent considerable time in perusing these Journals, for the reason that Speaker Thomas B. Reed, in stating the rule which governs Congress in the interpretation of the Fifth Article of the constitution, has said:

> "The first Congress, I think, had about 65 members, and the first amendment that was proposed to the Constitution was voted for by 37 members, obviously not two-thirds of the entire House. So the question seems to have been met right on the very threshold of our Government and disposed of in that way."
>
> Hinds Precedents, Vol. 5, p. 1010.

This ruling has been adopted by the Supreme Court in the case of *Missouri Pacific Railway Company* v. *Kansas,* and in the National Prohibition Cases, as the Law of the Land, governing the Fifth Article of the constitution. The Court says:

> "At the first session of the first Congress in 1789, a consideration of the provision authorizing the submission of amendments necessarily arose in the submission by Congress of the first ten amendments to the Constitution embodying a bill of rights. They were all adopted and submitted by each house organized as a legislative body pursuant to the Constitution, by less than the vote which would have been necessary had the constitutional provision been given the significance now attributed to it."
>
> *Missouri Pacific Railway Co.* v. *Kansas,* 248 U. S. 276, 281-2.

Courage would fail the writer to question such high authorities, but for the fact that he believes that, in so doing, he is defending the action, in the First Congress, of the patriotic Americans who with Washington framed our Constitution, and the others who were then struggling to help Washington start our Government.

The writer has not had time to more than skim the surface of this vastly important subject, but he refers, in defence of his respectful doubt of the accuracy of the conclusion of a great Speaker and of the great Court, to the proceedings in that First Session.

There appears, in the Senate Journal, no roll call on any of the proposals in the Senate.

The writer, with respectful regard for the high authority to the contrary, submits that, in his opinion, there

appears, in the House Journal, no roll call on any of the proposals in the House.

The writer has transcribed from the House Journal such entries as show the course of the Amendments through the House. These entries are submitted as an appendix to this brief. They are believed to be accurately transcribed, but the proof has not been compared back to the original Journal for lack of time, and if inaccuracies are found in them, they are unintentional.

The House was not unmindful of the constitutional requirement of a vote of two-thirds of the members.

Annals, pp. 433, 445, 660, 663, 664, 709, 716, 717.

So far as the writer has been able to find, there was no ruling made at that Session of Congress, in either House, as to what constituted two-thirds. But a significant entry appears in the Annals, where Mr. Livermore raised the question whether it was necessary, in committee, to carry a motion that two-thirds should agree. This led to a ruling in committee that a majority vote was sufficient for that purpose. The Annals speaks of there being some desultory conversation on the subject.

Annals, p. 717.

It may be that, in committee, it was decided, that, owing to the political necessity of the proposal of amendments, the members would all agree to the constitutional two-thirds of the whole House, on the final passage of the proposals in the House. There must have been some such understanding in both Houses, as it is most extraordinary that no roll-calls should be recorded in either House in the final passage of any proposed amendment (unless Speaker

Reed is right in construing the vote on the changes in the wording of the eighth proposal, recorded in the House Journal of September 24th, as such a final roll-call on the proposal of the amendments).

And yet after the ruling in the First Session above mentioned, in committee, Mr. Livermore stated that he did not care about the preamble because, "when it got before the House, it would be undone if one member more than one-third *of the whole* opposed it."

Annals, p. 718.

What the writer believes to have been the first mistake in appraising the action of the First Session of Congress, appears to have been made in the House on passage of the proposal of the Twelfth Amendment.

In the brief submitted by counsel for the Attorneys General of twenty-four States, in the case of *Kentucky Distilleries, etc.* v. *Gregory*, page 4, one of the National Prohibition Cases, the statement appears that when the Senate vote on the Twelfth Amendment was brought before the House, it was objected that the vote was not constitutional. This objection was met by appealing to the asserted precedent of the first ten amendments "showing that two-thirds of the members present fulfilled the constitutional requirement." The brief referred to the Annals of Congress, Eighth Congress, First Session, pp. 648-653.

It is submitted, in answer to this, that the following remarks of Elbridge Gerry may show that the attitude of the First Session in framing the proposals was consciously such as to attract the two sister states, Rhode Island and North Carolina, and the form "those present" may possibly have been used to suggest that those States were not outsiders.

"There are two States," he said, "not in the Union; it would be a very desirable circumstance to gain them. I should therefore be in favor of such amendments as might tend to invite them and gain their confidence; good policy will dictate to us to expedite that event. Gentlemen say, that we shall not obtain the consent of two thirds of both Houses to amendments. Are gentlemen willing then to throw Rhode Island and North Carolina into the situation of foreign nations? They have told you that they cannot accede to the Union, unless certain amendments are made to the constitution; if you deny a compliance with their request in that particular, you refuse an accommodation to bring about that desirable event, and leave them detached from the Union."

Annals, p. 445.

With all humility, and with due deference to the great men who have passed on the question, the writer submits that there are no precedents to be found in the record of the House of Representatives of the First Session of the First Congress that the requirements of the vote for the proposal of amendments to the Constitution are satisfied by an affirmative vote of two-thirds of a quorum. This question should be investigated further and all the facts should be brought out, so that this question may be settled. It is submitted that considering its importance this question has never received adequate attention.

The Senate Journal shows that on August 25, 1789, Mr. Beckley, the Clerk of the House of Representatives brought up the Resolve of the House that seventeen Amendments to the Constitution therein set forth be proposed to the Legislatures of the States, and requested the concurrence of the Senate therein. The proposed Joint Resolution contained

the words "*two-thirds of both Houses deeming it necessary*".

(Italics mine.) Senate Journal, page 103.

The final form, adopted after conference, of the preamble to the twelve articles of amendment which were proposed to the eleven States which had ratified and to the two which had not, is as follows:

> "The Conventions of a Number of the States having, at the Time of their adopting the Constitution, expressed a Desire, in order to prevent misconstruction or abuse of its Powers, that further declaratory and restrictive clauses should be added: And as extending the Ground of public Confidence in the Government, will best insure the beneficent Ends of its Institution—
>
> *Resolved*, by the Senate and House of Representatives of the United States of America in Congress assembled, *two-thirds of both Houses concurring*, That the following Articles be proposed to the Legislatures of the several States", &c.
>
> (Italics mine.) Senate Journal, page 163. And see *idem.*, Sept. 8, 1789.

Why the change was made from the words "two-thirds of both Houses deeming it necessary" to the words "two-thirds of both Houses concurring" is not disclosed in the Senate Journal. Possibly the reason was that quite a number of members thought a Bill of Rights had no rightful place in the Constitution.

Senate Journal, p. 123.

But the Supreme Court relies on the form of the original record in the Senate Journal, which reports the action

of the Senate as concurring in the House resolve in the terms "two-thirds of the Senators present concurring therein", and the record of the House Journal which agreed to amendments "two-thirds of the members present concurring on each vote" as demonstrating that these records were formulated with the purpose of refuting the contention now made.

Yet the absence of Representatives and Senators from Rhode Island and North Carolina, who were specifically mentioned in the Constitution; and the fact that the National Flag itself, which had been adopted by the resolution of the Continental Congress passed June 14, 1777, and floated over the First Congress with its "thirteen stars, white in a blue field, representing a new constellation"; made the difficulty of the Clerks in formulating the entries in the Journals of the action of the members present very great under the circumstances, there being Senators and Representatives from only eleven states present.

The opinion of the Court also states:

> "When it is considered that the chairman of the committee in charge of the amendments for the House was Mr. Madison, and that both branches of Congress contained many members who had participated in the deliberations of the convention or in the proceedings which led to the ratification of the Constitution, and that the whole subject was necessarily vividly present in the minds of those who dealt with it, the convincing effect of the action cannot be overstated."
>
> 248 U. S. 282

Yet there is in the New York Public Library an original manuscript letter, dated August 24, 1789, by Mr. Madison to his fellow member of the House from Virginia, Mr.

> "The week past has been devoted to the subject of amendments. All that remains is a formal vote on a fair transcript, which will be taken this morning; and without debate I hope, as each of the propositions has been agreed to by two-thirds of the House."

This letter which is also published in Madison's works, would seem to indicate that by the entries "two-thirds of the members present", the Clerk meant two-thirds of all the members from the eleven states which had ratified the Constitution and were represented in the First Congress. Mr. Madison's letter was written before the meeting which was to vote on the amendments, and he could not, in advance of the meeting, have referred to a quorum when he stated that each of the propositions had been agreed to by two-thirds of the House.

It is respectfully submitted that no adequate study of this subject has yet been made, but, if the Senate in its resolution changed the words "deeming it necessary" (the words of the Constitution), to the words "concurring therein", although the record shows that for reasons of expediency they deemed it vitally necessary, possibly the words "two-thirds of the Senators present" were used instead of the words "two-thirds of the Senate" for the reason that they had in mind the Senators whom they hoped would soon be sent to the Senate from the remaining States but who were not yet present.

Senate Journal, p. 131.

The proposal actually communicated to the States was in the words: "*Resolved*, by the Senate and House of Representatives of the United States of America in Congress

assembled, two-thirds of both Houses concurring. That the following Articles be proposed to the Legislatures of the several States, * * * "

Senate Journal, p. 163.

It is respectfully submitted with some confidence that the suggestion that the First Session of the First Congress disregarded the Constitutional requirements of the Fifth Article of the Constitution as written, is not supported by the record.

The Eleventh Amendment.

This Amendment providing that a State could not be sued in the Federal Courts by citizens of another State or Country, was proposed in 1794.

In the Senate of 30 members, the vote was 23 to 2.

Annals Third Congress, p. 30;
Senate Journal, Third Congress, p. 31.

In the House of about 95 members, the vote was 81 to 9.

Annals Third Congress, p. 477;
House Journal, Third Congress, pp. 165-6.

The writer has counted the number of members of the Third Congress that are reported in the Journal thereof as having appeared and taken the oath prior to the passage of the resolution proposing the Eleventh Amendment. The figure given is believed to be correct.

This Amendment seems to have been proposed in compliance with the requirements of the Fifth Article of the Constitution as written, with due deference to the statement

to the contrary in the opinion in *Missouri Pacific Railway Co.* v. *Kansas,* 248 U. S. 276, 283.

It is humbly and respectfully submitted that the requirements of the Fifth Article of the Constitution were adhered to during Washington's administration.

The Twelfth Amendment.

A few words must be said of the Twelfth Amendment, and of the circumstances surrounding its proposal. In the belief of the writer, from such study as he has been able to give to this great subject, the action of the Senate at the time of their proposal of that Amendment, to which Gouverneur Morris's letter to Senator Tracy refers, was the first instance of disregard for the requirements of the Fifth Article of the Constitution, as written.

The Presidential election of 1800 was held under the old electoral college system as provided for in the Second Article of the original Constitution, by which the person receiving the largest number of electoral votes became President and the one for whom the second largest number of votes were cast became the Vice-President.

In February, 1801, the Electoral votes were counted and were found to be: for Thomas Jefferson, 73; for Aaron Burr, 73; for John Adams, 65; for Charles Cotesworth Pinckney, 64, and for John Jay, 1. There was no name highest on the list, consequently there was no choice, and the election was to be made by the House of Representatives, between the two highest candidates, each State having one vote. The House was Federalist, but was restricted to a choice between two Republicans. Of the two, many Federalists preferred Burr, partly to keep the Presidency

from their most dangerous enemy, Jefferson, and partly to baulk the evident intention of the Republicans. The balloting began February 11th. Eight states voted for Jefferson, six for Burr, and two were without votes, because of equal division among their members. There being sixteen States, there was yet no election. Balloting continued until February 17th, when ten States voted for Jefferson, four for Burr, and two blank, and Jefferson was declared elected President, and Burr Vice-President.

This was the first great political revolution since 1787, except that the Federalists still had control of the Judiciary.

The Judiciary Law passed at the last session of the Congress had erected twenty-four new Federal Courts. The Republicans claimed that there had not been business enough to occupy the United States Courts already in existence, that the bill creating the Courts had been hastily drawn after the Republican success in the last election, in order to provide offices for Federalist leaders, and that President Adams had been kept busy till midnight of his last day of office in signing commissions for the judges. All this seemed to the Republicans a gross abuse of power and they proposed to repeal the Judiciary Law. The Constitution seemed plainly to prohibit any such repeal. Party necessities and vindictiveness, however, soon found available interpretations for the Constitution and the law was repealed, and the Federalists driven forever from power, and Congress adjourned. This account is summarized from Johnston's American Politics.

The first session of the next Congress proposed what is known to us as the Twelfth Amendment, changing the manner of the Presidential election.

Resolutions proposing the amendment were introduced in the House on the first day of the session, and in the Senate on the fifth day.

Annals 8th Cong., 1st Sess., pp. 372, 15.

The Resolution in the Senate was bitterly fought, and Senator Uriah Tracy, from Connecticut, made a speech on the Fifth Article of the Constitution, a copy of which he sent to Gouverneur Morris asking his views as to its accuracy, which called forth the reply of Morris, dated January 5, 1804, quoted above.

3 Morris, 198.

In adverting to the vote required under the Fifth Article, Senator Tracy said in his speech that this was a point which, "I am told has never been agitated, but is certainly worthy of attention."

In the Senate of 34; the vote was 22 to 10.

In the House of 136; the vote was 84 to 42, the speaker voting yea.

Annals 8th Congress, 1st Session, pp. 175-6; 209; 775.

Morris, a Federalist, had been Senator from New York, but his term had ended March 4, 1803, and he had retired to Morrisania, the New York Legislature being then Republican. He had, as Senator, communicated to the Senate resolutions of the New York Legislature favoring this then proposed Amendment to which he was opposed, as he stated to the New York Legislature, for the reasons he thus expressed:

"First, I am opposed to amendments, on the general ground that changing the articles of a constitutional compact lessens that respect for it, which is a main support of free governments.

"Secondly, I am opposed, because it is, generally speaking, better to bear an evil, which we know, than hazard those which we are unacquainted with.

"Thirdly, I am opposed, because the present mode seems preferable to that which is proposed."

3 Morris, 174.

Though a Federalist, Morris was more a patriot than a partisan. Writing to Robert R. Livingston, a Republican, he says: "I am connected with the members of my party by their worth, and by their kindness. If I could for a moment suppose they harbored designs unfriendly to our country, that moment the connexion would be dissolved. But I have all the evidence which the nature of the case admits that their views are honorable, just and patriotic. I believe this also of many among your party, and among your present adversaries."

1 Morris, 485.

Jared Sparks, commenting on Morris, says that,

"It must however be kept in mind, that his political views were essentially his own, and that, although he chose to range himself in the line of the Federalists, he did not pretend to act with them in all respects as a party. On the contrary, he was opposed to some of their prominent measures. Hence it would be an error to confound any speculations, dogmas, or statments in his writings with federalism, as recognized by the party at that time; or to consider the party responsible for them as coming from a leader of their ranks. He carried into politics,

as into everything else, his bold and independent turn of thinking, and on all subjects he was accustomed to express his opinions with prompt decision, a fearless freedom, and an indifference to public censure or applause. He was often consulted by members of Congress on the important questions before that body, and his correspondence will show with what unreserve and fulness he uttered his sentiments and counsels."

1 Morris, 486.

Gouverneur Morris died November 6, 1818.

"Let us forget party," said he, "and think of our country which embraces all parties."

1. Curtis's Constitution, 447.

That Morris in his letter merely stated what every one understood when the Constitution was adopted is shown by many contemporary statements. Among others:

Madison, writing to Jefferson, on June 13, 1789, spoke of the proposals which became the first amendments "as most likely to pass through two thirds of the House and of the Senate."

Richard Henry Lee, Senator from Virginia in the First Congress, writing to George Mason who had served with him in the Convention of 1787, said: "In the Fifth Article it is stated that two thirds of Congress may propose amendments."

Patrick Henry, speaking in the Virginia Convention of 1788, said: "Two thirds of the Congress or of the State Legislatures are necessary even to propose amendments. If one third of them be unworthy they may prevent the application for amendments."

Elliot, Vol. III, p. 49.

That he appreciated the different requirements of the vote on treaties is shown by his statement: "Two thirds of the Senators present can make treaties." Ib. p. 650.

Noah Webster, in a pamphlet published in Philadelphia in 1787, wrote: "Two thirds of both houses of Congress or the application of two-thirds of the Legislatures may open the door for amendments."

Roger Sherman, a member of the Convention of 1787, and of the First Congress, writing to John Adams, then Vice President, on July 20, 1789, said: "But if two thirds of the members of each house, after considering the reasons offered by the President should adhere to the former opinion, will not that be the most safe foundation to rest the decision upon?"

Adams's Works, Vol. VI, p. 439.

Rufus King, a member of the Committee on Style of the Convention of 1787, and Senator from New York in the First Congress, speaking in the Massachusetts Convention of 1788, said: "When the Governor objects to a bill it cannot become law unless two thirds of both branches afterward concur in enacting it; the same must be done by the Congress provided the President objects." * * * "Treaties * * * "may be formed by the President with the advice of two thirds of a quorum of Senators present."

Life and Correspondence, Vol. I, p. 306.

Oliver Ellsworth, member of the Committee of Detail of the Convention of 1787, which committee George Ticknor Curtis thought changed the vote requisite to overrule the veto, in which thought he has been followed by the Supreme Court in the *Kansas* case, writing in the "Letters of a Landowner" before the Connecticut Convention in

1788, said: "It is an excellency of this Constitution that it is expressed with brevity and in the plain common language of mankind." And speaking of the President's veto, he said: "If he returns the bill with his objections, the Senate and Representatives consider it a second time, and if two thirds of them adhere to the first resolution, it becomes law notwithstanding the President's dissent." This statement by a member of the Committee of Detail of the Convention of 1787 shows that George Ticknor Curtis's note in his History of the Constitution, Vol. 2, p. 267, note, quoted by the Supreme Court, is a mistake.

Was Usurpation Transformed Into Precedent?

After the adoption of the Twelfth Amendment no other was adopted until the necessity arose of making Lincoln's Emancipation Proclamation, which was recognized by its author as a war measure, a part of the Federal Constitution.

The Thirteenth Amendment was proposed to the States on February 1st, 1865. In the interval since December 12, 1803, on which the Twelfth Amendment was proposed, there had been discussions in Congress of other proposals, and action taken thereon, which are interesting, as showing the transformation of the legislative action (which the writer believes to have been a clear act of usurpation by Congress) in proposing the Twelfth Amendment by less than two-thirds of the whole Houses, into the present established precedent in Congress.

In view of certain assertions of the Court in its opinion in *Missouri Pacific Railway Company* v. *Kansas*, the statements under this heading are made with due deference to the great Court, but with sincere belief that they are true.

It will need much careful research and study to digest

all the Congressional precedents. The subject is worthy of this study, however, as there is grave danger that, in the future, some of the numerous proposals now before Congress, or others yet to come, may distort the Constitution, if the present construction of the Fifth Article of the instrument is adhered to.

The precedents in Congress in relation to the vote necessary to propose an Amendment are set forth in Hinds' Precedents: §§7027-7038.

And see in relation to the meaning of the two-thirds required in the passage of bills over the veto of the President, *Ib.* §§3537, 3538.

Time does not suffice to digest and state these precedents for use in this brief. It may be said, however, that the precedents are by no means uniform, or clear, and that, to understand them, the actual debates in Congress must be read, with sufficient imagination to appreciate the varying surroundings and circumstances in which they were passed.

To the writer they seem to show that, in the early days, two thirds of all the members were recognized as necessary. During the Civil War period, and the years leading up to it, doubt, and a somewhat illogical and careless construction of the words of the Constitution, appear, with reliance on the Supreme Court as the ultimate arbiter. Finally, Speaker Reed's absolute ruling was made in 1898.

Speaker Reed's Rule.

On May 11, 1898, Mr. John B. Corliss, of Michigan, called up a joint resolution proposing an amendment to the Constitution providing for the election of Senators of the United States. The question being taken on the passage of the resolution, there were yeas 184, nays 11, and the Speaker announced that the joint resolution was passed, two-thirds

having voted in favor thereof. Mr. Ebenezer J. Hill, of Connecticut, made the point of order that the vote required was two-thirds of the entire membership, not two-thirds of a quorum.

The Speaker said:

"The question is one that has been so often decided that it seems hardly necessary to dwell upon it. The provision of the Constitution says 'two-thirds of both Houses'. What constitutes a House? A quorum of the membership, a majority, one half and one more. That is all that is necessary to constitute a House to do all the business that comes before the House. Among the business that comes before the House is the reconsideration of a bill which has been vetoed by the President; another is a proposed amendment to the Constitution; and the practice is uniform in both cases that if a quorum of the House is present the House is constituted and two-thirds of those voting are sufficient in order to accomplish the object. It has nothing to do with the question of what States are present and represented, or what States are present and vote for it. It is the House of Representatives in this instance that votes and performs its part of the function. If the Senate does the same thing, then the matter is submitted to the States directly, and they pass upon it.

"The first Congress, I think, had about 65 members, and the first amendment that was proposed to the Constitution was voted for by 37 members, obviously not two-thirds of the entire House. So the question seems to have been met right on the very threshold of our Government and disposed of in that way."

Hinds' Precedents of the House of Representatives, vol. 5, pp. 1009-1010; §7027.

The Supreme Court has adopted this later construction of the Fifth Article of the Constitution, and has fully accepted Speaker Reed's rule.

Missouri Pacific Ry. Co. v. *Kansas*, 248 U. S. 276, 283-4.

THE THIRTEENTH AND SUBSEQUENT AMENDMENTS.

The Emancipation Proclamation crowns the greatest achievement of our National history, and justly ranks, in the minds and hearts of the People, with the Declaration of Independence and the Constitution.

Nothing can ever disturb it, and, whether technically proposed or not, the Thirteenth Amendment, which wrote it into the Constitution, is so much a part of our History that no man would ever wish or dare to question it. It is a sacred covenant with an injured race, sealed with the best blood of young America, from North and South.

The other and subsequent Amendments may all be considered secure in the light of History. They were proposed in the manner approved at the time by Congressional usage and precedent, were not formally questioned when proposed and were ratified by the States. The certificates of their proposal, ratification and adoption are, presumably, fair on their face, and the vote by which they were adopted is probably not a justiciable matter. The time for technical objection to them is long passed.

But a very different question is raised when it is attempted to adopt Speaker Reed's rule of construction of the Fifth Article, as the rule for future guidance of the Court in questions of Amendments to be proposed in the future.

The Eighteenth Amendment.

And it is submitted that the right to question the Eighteenth Amendment may not have been lost, especially by the State of New York.

In New York, the objection was made before the Joint Committee of the New York Legislature by Everett P. Wheeler in 1918, when the Amendment was first proposed, that the proposal had not received the vote in Congress required by the Constitution.

This was followed by a minority opinion on that ground in the Judiciary Committee of the Assembly of 1918, and opposition on that ground from the floor of the Assembly, which was overruled by the Speaker, who declared that question would have to be passed on by the Supreme Court. The New York Legislature, by Joint Resolution called for and received duly certified roll calls on the proposal of the Amendment from both Houses of Congress. The question was later briefed in the Supreme Court in the Public Interest.

> N. Y. Assembly Journal, 1918, vol. I, pp. 575-6, 634-5, 700-704.

So that, if the Supreme Court inclines to modify its decision, while the other Amendments will stand unshaken, it must be recognized that the decision of the Court was rendered in regard to the Eighteenth Amendment, and any modification of it might affect that Amendment.

The Constitution.

The Constitution belongs to all the People.
It was given to us by Washington.

When, in the past, it has been assailed, the People have defended it; last, with the help of Lincoln.

Now, it is again in danger. Personal and party prejudices are running strong. Transitory measures are blinding us to the true issues.

We don't know whom to trust.

Story, in the concluding paragraph of his Commentaries on the Constitution, says of it: "It" (the Constitution) "has been reared for immortality, if the work of man may justly aspire to such a title. It may nevertheless perish in an hour by the folly or corruption or negligence of its only keepers,—THE PEOPLE."

This brief is filed in the hope that one of the People may help the Court to ascertain the Truth.

After reading what Gouverneur Morris, the draftsman of the Constitution, says of its meaning, and after reading the Journals of the Senate and House of the First Session of the First Congress, in the light of history, is it clear that Speaker Reed was right?

Only eleven of the thirteen States were then represented by Senators and Representatives.

The anxiety lest the new Government fail was very evident.

Do the words of the Senate Resolution in the First Session of the First Congress concurring in the House Resolve in the terms—"two thirds of the Senators present concurring therein"—make it clear that two-thirds of a quorum are sufficient to propose Amendments?

This may become a very important question in the life of the Constitution.

Is there not evidence in the record of the First Congress that the patriots who composed it were willing to put aside their individual ideas to get the Constitutional majority and at the same time not offend the States of Rhode Island and North Carolina?

Speaker Reed's pronouncement, which the Supreme Court has adopted, as the Law of the Land, it is submitted, pales in the light of Washington's First Inaugural.

We need help to see the Truth.

At such a crisis, it is altogether fitting that we should turn, for help, to Washington.

It is respectfully urged that the Eighteenth Amendment to the Constitution was not proposed in accordance with the provisions of the Constitution, and is void, and that the judgment appealed from should be affirmed.

Respectfully submitted,

ELIOT TUCKERMAN
(As *Amicus Curiae*).

APPENDIX.

EXTRACTS AND STATEMENTS TAKEN FROM THE JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE FIRST SESSION OF THE FIRST CONGRESS. PRINTED BY FRANCIS CHILDS AND JOHN SWAINE (NOT DATED BUT BELIEVED TO BE CONTEMPORANEOUS), RELATING TO THE FIRST TEN AMENDMENTS PROPOSED TO THE LEGISLATURES OF THE UNITED STATES BY CONGRESS.

Tuesday, May 5, 1789. The House in replying to the clauses of President Washington's First Inaugural Address referring to the proposal of Amendments to the Constitution said:

> "The question arising out of the fifth article of the Constitution will receive all the attention demanded by its importance; and will, we trust be decided, under the influence of all the considerations to which you allude." Page 33.

Monday, June 8. "A motion was made and seconded, that the House do come to a resolution, stating certain specific amendments, proper to be proposed by Congress, to the legislatures of the States, to become, if ratified by three fourths thereof, part of the Constitution of the United States:—Whereupon, ORDERED, that the said motion be referred to the consideration of the committee of the whole House, on the state of the Union". Page 57.

Tuesday, July 21. On motion, the committee of the whole House, was discharged from proceeding on the motion of June 8th and that motion together with the amendments proposed by the several States were "referred to a committee to consist of a member from each State, with instruction to take the subject of amendments to the Constitution of the United States generally into their consideration, and to report thereupon to the House." Page 79.

"The members elected Mr. Vining, Mr. Madison, Mr. Baldwin, Mr. Sherman, Mr. Burke, Mr. Gilman, Mr.

Clymer, Mr. Benson, Mr. Goodhue, Mr. Boudinot, and Mr. Gale." Page 80.

Tuesday, July 28. "Mr. Vining, from the committee of eleven, to whom it was referred to take the subject of amendments to the Constitution of the United States, generally, into their consideration, and to report thereupon, made a report, which was read, and ordered to lie on the table." Page 85.

Monday, August 3. "On motion, RESOLVED, That this House will on Wednesday se'nnight resolve itself into a committee of the whole House to take into consideration the report from the committee of eleven, to whom it was referred, to take the subject of amendments to the Constitution of the United States, generally, into their consideration, and to report thereupon". Page 88.

The Committee of the whole House accordingly considered the matter on Thursday, August 13; Friday, August 14; Saturday, August 15; Monday, August 17. Pages 100, 101, 102.

Tuesday, August 18. "On motion made that the House do agree to the following order, to wit: 'That such of the amendments to the Constitution proposed by the several States, as are not in substance comprised in the report of the select committee appointed to consider amendments, be referred to a committee of the whole House; and that all the amendments which shall be agreed to by the committee last mentioned, be included in one report.'

"The previous question was demanded by five members. Shall the main question to agree to the said order be now put?—And on the question, Shall the main question be now put?

"It passed in the negative, { AYES, 16. / NOES, 34.

"And so the motion was lost.

"The ayes and noes being demanded by one fifth of the members," the roll call follows. Page 102.

The committee of the whole House again proceeded, and, when the Speaker resumed the chair, reported that the

Committee had had the report of the committee of eleven under consideration, and made several amendments thereto which were read and ordered to lie upon the table. Page 103.

A motion was made that a number of amendments to the Constitution therein mentioned, should be referred to the consideration of the committee of the whole House. It passed in the negative. Pages 103-4.

The amendments to the report of the committee of eleven, proposed by the Committee of the whole House were considered on Wednesday, August 19, and Thursday, August 20. Page 106.

Friday, August 21. "The House resumed the consideration of the amendments made by the committee of the whole House, to the report from the committee of eleven, to whom it was referred to take the subject of amendments to the Constitution of the United States, generally into their consideration; and the said amendments being partly agreed to, and partly disagreed to.

"The House proceeded to consider the original report of the committee of eleven, consisting of seventeen articles, as now amended; whereupon the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh twelfth, thirteenth, fourteenth, fifteenth and sixteenth articles being again read and debated, were, upon the question severally put thereupon, agreed to by the House, as follows, two thirds of the members present concurring, to wit:" Page 107.

Here follow the sixteen proposals.

"The seventeenth article in the words following, to wit, 'The powers not delegated by the Constitution, nor prohibited by it to the States, are reserved to the States respectively,' being under debate, a motion was made, and the question being put to amend the same by inserting after the word '*not*', the word '*expressly*'.

"It passed in the negative, { AYES, 17. / NOES, 32.

"The ayes and noes being demanded by one fifth of the members present," * * * Then follows a roll call. Page 108.

"And then the main question being put that the House do agree to the said seventeenth article:

"It was resolved in the affirmative, two-thirds of the members present concurring." Page 109.

A motion was then made to add to the articles another, it passed in the negative 23 to 28 and the ayes and noes being demanded by one-fifth of the members present a roll call is printed. Further consideration of the amendments was postponed until the next day. Pages 109-10.

Saturday, August 22. A motion was made to add another amendment, which passed in the negative 9 to 39, and the ayes and noes being demanded by one-fifth of the members present, a roll call is printed. Pages 110-11.

Four other amendments were then proposed and passed in the negative without stating the vote. Page 111.

"On motion, Ordered, That it be referred to a committee of three, to prepare and report a proper arrangement of, and introduction to the articles of amendment to the Constitution of the United States, as agreed to by the House; and that Mr. Benson, Mr. Sherman, and Mr. Sedgwick be of the said committee." Page 112.

Monday, August 24. "Mr. Benson, from the committee appointed, reported according to order, an arrangement of the articles of amendment to the Constitution of the United States, as agreed to by the House on Friday last; also a resolution proper to be prefixed to the same, which resolution he delivered in at the clerk's table, where the same was twice read and agreed to by the House, as followeth:

"Resolved, By the Senate and House of Representatives of the United States of America in Congress assembled, two-thirds of both Houses deeming it necessary, That the following articles be proposed to the legislatures of the several states, as amendments to the Constitution of the

United States, all or any of which articles when ratified by three-fourths of the said legislatures, to be valid to all intents and purposes as part of the said Constitution.

"ORDERED, that the clerk of this House do carry to the Senate a fair engrossed copy of the said proposed articles of amendment, and desire their concurrence." Pages 112-113.

Thursday, September 10. "A message from the Senate by Mr. Otis, their Secretary.

"Mr. Speaker—The Senate have agreed to the resolution of this House of the 21st ult. containing certain articles to be proposed by Congress to the legislatures of the several States, as amendments to the constitution of the United States, with several amendments, to which they desire the concurrence of this House: and then he withdrew." Page 134.

Saturday, September 19. "The House proceeded to consider the amendments proposed by the Senate to the several articles of amendment to the Constitution of the United States, agreed to by this House, and sent to the Senate for their concurrence, and having made some progress therein,

ORDERED, That the further consideration of the said amendments be postponed until Monday next." Page 145.

Monday, September 21. "The House resumed the consideration of the amendments proposed by the Senate to the several articles of amendment to the Constitution of the United States, as agreed to by this House, and sent to the Senate for concurrence:

Whereupon,

"RESOLVED, That this House doth agree to the second, fourth, eighth, twelfth, thirteenth, sixteenth, eighteenth, nineteenth, twenty-fifth, and twenty-sixth amendments, and doth disagree to the first, third, fifth, sixth, seventh, ninth, tenth, eleventh, fourteenth, fifteenth, seventeenth, twentieth, twenty-first, twenty-second, twenty-third, and twenty-fourth

amendments proposed by the Senate to the said articles, two-thirds of the members present concurring on each vote.

"Resolved, That a conference be desired with the Senate on the subject matter of the amendments disagreed to, and that Mr. Madison, Mr. Sherman and Mr. Vining, be appointed managers at the same on the part of this House.

"Ordered, That the Clerk of this House do acquaint the Senate therewith, and desire their concurrence." Page 146.

* * * * * *

A message from the Senate by Mr. Otis, their Secretary.

"Mr. Speaker—* * * The Senate do also recede from their third amendment disagreed to by this House to the articles of amendment to the constitution of the United States, which were agreed to by this House, and sent to them for concurrence: And do insist on the other amendments to the said articles, disagreed to by this House: They have also agreed to the conference desired by this House on the subject matter of the amendments disagreed to, and have appointed managers at the same on their part: And then he withdrew." Page 147.

Wednesday, September 23. "Mr. Madison from the managers appointed on the part of this House to attend a conference with the Senate on the subject matter of the amendments depending between the two Houses to the articles of amendment to the Constitution of the United States, agreed to by this House, and sent to the Senate for their concurrence, made a report, which was read, and ordered to lie on the table." Page 151.

Thursday, September 24. "The House proceeded to consider the report of a committee of conference, on the subject matter of the amendments, depending between the two Houses to the several articles of amendment to the constitution of the United States, as proposed by this House: Whereupon,

"RESOLVED, That this House doth recede from their disagreement to the first, third, fifth, sixth, seventh, ninth, tenth, eleventh, fourteenth, fifteenth, seventeenth, twentieth, twenty-first, twenty-second, twenty-third, and twenty-fourth amendments, insisted on by the Senate: PROVIDED, That the two articles which by the amendments of the Senate are now proposed to be inserted as the third and eighth articles, shall be amended to read as followeth;

"Article the Third. 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances'.

"Article the Eighth. 'In all criminal prosecutions, the accused shall enjoy the right of a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of council for his defence'.

"AND PROVIDED ALSO, That the first article be amended by striking out the word '*less*', in the last place of the said first article, and inserting in the lieu thereof, the word 'more'.

"On the question, that the House do agree to the alteration and amendment of the eighth article, in the manner aforesaid,

"It was resolved in the affirmative. {AYES 37. / NOES 14.

"The ayes and noes being demanded by one-fifth of the members present,

"Those who voted in the affirmative, are,

Fisher Ames,
Abraham Baldwin,
Egbert Benson,
Elias Boudinot,
John Brown,
Lambert Cadwalader,
Daniel Carroll,
George Clymer,
Benjamin Contee,
Thomas Fitzsimmons,
Abiel Foster,
George Gale,
Nicholas Gilman,
Benjamin Goodhue,
Samuel Griffin,
Thomas Hartley,
Richard Bland Lee,
George Leonard,
James Madison, junior,
Andrew Moore,
Peter Muhlenberg,
Josiah Parker,
George Partridge,
James Schureman,
Thomas Scott,
Joshua Seney,
Roger Sherman,
Peter Silvester,
Thomas Sinnickson,
William Smith, (of Maryland),
William Smith, (of South Carolina),
Michael Jenifer Stone,
George Thatcher,
Jonathan Trumbull,
John Vining,
Alexander White, and
Henry Wynkoop.

"Those who voted in the negative, are,

Theodorick Bland,
Edanus Burke,
Isaac Coles,
William Floyd,
Elbridge Gerry,
Jonathan Grout,
John Hathorn,
James Jackson,
Samuel Livermore,
George Matthews,
John Page,
Jeremiah Van Rensselaer,
Thomas Sumpter, and
Thomas Tuder Tucker.

"On motion,

Resolved, That the President of the United States be requested to transmit to the Executives of the several states which have ratified the Constitution, copies of the amendments proposed by Congress to be added thereto; and like copies to the Executives of the states of Rhode-Island and North-Carolina.

"ORDERED, That the clerk of this House do carry the said resolution to the Senate, and desire their concurrence." Pages 152-3.

Friday, September 25. "A message from the Senate, by Mr. Otis their Secretary.

"Mr. Speaker—The Senate agree to the amendments proposed by this House to their amendments to the several articles of amendment to the Constitution of the United States: And then he withdrew. Page 156.

Monday, September 28. "A message from the Senate by Mr. Otis their Secretary.

"Mr. Speaker—The Senate have agreed to the resolution desiring the President of the United States to recommend a day of general thanksgiving; also to the resolution desiring the President of the United States to transmit to the Executives of the several States in the Union and also to the Executives of the States of Rhode-Island and North-Carolina, copies of the amendments agreed to by Congress to the Constitution of the United States:" * * * "And then he withdrew." Page 158.